No. 96-1856

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ALBIN A. RHOMBERG, JOHN BURNS, MICHAEL BURNS, THERESA REALI, SCOTT KILEY, JACK COOKE, JOSEPH SCHEIDLER, AND ESTATE OF JOHN SZABO,

Petitioners,

vs.

PETE WILSON; BOB WHITE; MARTY WILSON; PETE WILSON FOR GOVERNOR CAMPAIGN COMMITTEE; PETE WILSON INAUGURAL COMMITTEE; RUSSELL COLLIAU; KAREN McGAGIN; TOM COOPER; DUANE LOWE; MONTEY HENSLEY; JAMES PENNELL; R. BARTUCCO; J.E. EVERETT; P.D. HARDER; W.E. MACDONALD; A. PEREZ; D.H. PETERS; PETER OSTERGAR; DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CITY OF SACRAMENTO; GREGORY TWILLING; & P. DOWDEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions which apply to Respondents Russell Colliau, Tom Cooper, Martin Wilson, the Pete Wilson Campaign Committee and the 1991 Inaugural Committee are as follows:

1. Must a federal judge recuse himself where one of the parties previously recommended him to be nominated for a federal judgeship, or where he was employed as an attorney by a municipal defendant two years before the acts giving rise to the lawsuit?

2. Does the Petition raise any compelling reasons to grant review, within the meaning of Rule 10 of the Supreme Court Rules, concerning the jury verdicts in favor of Russell Colliau and the Inaugural Committee or the summary judgments in favor of Tom Cooper, Marty Wilson and the Pete Wilson Campaign Committee?

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I. INTRODUCTION.

This Brief In Opposition is submitted on behalf of Respondents Russell Colliau, the 1991 Inaugural Committee – a California nonprofit corporation (Inaugural Committee), Martin Wilson, Tom Cooper and the Governor Pete Wilson Committee (Campaign Committee). These Respondents were referred to in the District and Circuit Courts, and are sometimes collectively referred to here, as the "Committee Defendants." At the outset it should be noted that, although there are nine Petitioners in this Court, *only* one, Albin Rhomberg, appealed the judgments below in favor of the Committee Defendants. This brief is thus limited to a discussion of the Petition for Certiorari as it applies to Rhomberg's claims against the Committee Defendants.

We respectfully submit that Rhomberg's Petition for Certiorari should be denied. The Petition fails to establish the existence of any "compelling reason" to grant certiorari as required by Rule 10 of the Supreme Court Rules; nor does it articulate any coherent reason why the judgments below in favor of the Committee Defendants should be reversed. A cursory review of the record below reveals that the District Court quite properly entered summary judgment against Rhomberg and in favor of defendants Tom Cooper, Martin Wilson and the Campaign Committee. And, following a nine-day trial, a unanimous jury rendered an unassailable verdict against Rhomberg and in favor of Committee Defendants Russell Colliau and the Inaugural Committee. A panel of the U.S. Court of Appeals for the Ninth Circuit correctly and unanimously affirmed these judgments.

II. STATEMENT OF THE CASE.

A. Proceedings And Disposition Below.

Rhomberg and nine other plaintiffs filed their complaint in the District Court below on January 6, 1992. The case was assigned to Judge Garland Burrell on March 13, 1992. (Committee Defendants' Excerpts of Record filed in the U.S. Court of Appeals for the Ninth Circuit (Comm. ER) at 9.) The District Court set a discovery cutoff date of March 3, 1994 and considerable discovery ensued. On February 14, 1994, the District Court issued an order denying plaintiffs' motion to extend the discovery cut-off date. (Comm. ER at 22-25.) On March 18, 1994, plaintiffs filed a motion to recuse Judge Burrell. (Appellant's Excerpts of Record Filed in the Ninth Circuit (AER) at 1559.) The recusal motion was denied after hearing. (City Appellees Excerpts of Records (City ER) at 1-3.)

The District Court entered an Order on February 23, 1995, granting the Committee Defendants' summary judgment motions in part and denying them in part. (AER at 1257-1319.) Plaintiffs moved for reconsideration on March 6, 1996 (AER at 1320), which motion was granted in part and denied in part. The result of these motions was that summary judgment was granted in favor of Tom Cooper, Martin Wilson and the Campaign Committee against Rhomberg; and the summary judgment motions by Colliau and the Inaugural Committee against Rhomberg were denied.[1] Rhomberg's claims

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[1] During this time period, a settlement was reached between the Committee Defendants and all plaintiffs except Rhomberg; this is why only Rhomberg appealed the judgments entered below in favor of the Committee Defendants.

against Colliau and the Inaugural Committee were tried to a six-member jury commencing on May 5, 1995.[2] After a nine-day trial, the jury deliberated for one hour and returned a unanimous verdict in favor of Colliau and the Inaugural Committee.

Rhomberg made no motion for a new trial or any other post-trial relief.

Rhomberg timely appealed to the Ninth Circuit and, on February 18, 1997, the Court of Appeals unanimously affirmed the judgments entered in favor of all Committee Defendants against Rhomberg.

B. Statement Of Facts Relevant To The Issues Presented For Review.[3]

This lawsuit arose out of an incident which occurred at the Roman Catholic Cathedral of the Blessed Sacrament in downtown Sacramento on January 6, 1991, during an ecumenical prayer service which was part of the activities relating to the inauguration of Pete Wilson to his first term as Governor. (AER at 1-51.) Wilson was elected Governor in November of 1990 and was to be sworn into office on Monday, January 7, 1991.

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[2] The claims of plaintiff Theresa Reali against certain State and City Defendants and the claims of plaintiffs John and Michael Burns against certain other defendants were also tried.

[3] The Petition for Certiorari presents seven questions for review. The only questions which appear to have any relationship to Rhomberg's claims against the Committee Defendants are nos. 1 and 7. Even that, however, is far from clear.

Shortly after the election, the Governor's supporters established a nonprofit corporation called the 1991 Inaugural Committee which organized various events relating to the inauguration of Governor Wilson (e.g., the swearing-in ceremony, several inauguration balls/galas, and the ecumenical prayer service). Many people were expected to come to Sacramento from around the state and country for the inauguration, and the prayer service was planned to offer the prayers of different faiths for the new administration. (RT at 457, 691, 884, 890, 904.)

The Cathedral's pastor, Monsignor James Kidder, and the Bishop of Sacramento, Francis Quinn, gave permission to hold the ecumenical prayer service in the Cathedral of the Blessed Sacrament. In fact, both the Monsignor and the Bishop were co-celebrants of the service, as were clergy from many other faiths. (RT at 760, 884, 888, 894, 901, 902, 904, 910 & 911.)

A small group of anti-abortion protestors[4] (including appellant Rhomberg) objected to the ecumenical prayer service; since Governor-elect Wilson was pro-choice, they believed it would be sacrilegious to use the Cathedral for a prayer service relating to his inauguration as Governor. Monsignor Kidder and Bishop Quinn disagreed with these objections and reaffirmed that the ecumenical service was an appropriate event to be held in the Cathedral. (RT 905-909, 1044-1053.) The Governor-elect had no active role in the service; he was merely an attendee.

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[4] Later many of these protestors would become plaintiffs in this case.

Respondent Russell Colliau was a soon-to-be college graduate who was interested in politics. After the election he was employed as a mailroom clerk in the Governor-elect's transition office. (Reporter's Transcript on Appeal (RT) at 683-688.) Respondent Tom Cooper was an acquaintance of Colliau and was an Inaugural Committee volunteer. Cooper asked whether Colliau would like to be the volunteer head usher at the prayer service. Colliau agreed. (RT at 690-692.)

Several days before the ecumenical service was held, Colliau met at the Cathedral with Monsignor Kidder and a number of other people involved with the event, including several State Policemen. The State Police explained standard security precautions, including what would happen in the event there was a disturbance inside the Cathedral. In such event, the State Police told Colliau that he should approach the persons making the disturbance, ask them to stop and tell them if they refused they would be placed under citizen's arrest; if they persisted, he was to nod to the State Police and that would indicate the person was placed under citizen's arrest, in which event the State Police would remove the person from the Cathedral. (RT at 693-698; see also RT at 884-886.)

The State Police told Colliau that this was the proper procedure for dealing with a disturbance inside the Cathedral and they gave him a copy of Penal Code section 302, which specified that disturbances of religious services were misdemeanors. (RT at 693-698.) Monsignor Kidder was present during this meeting. He testified at trial that security issues such as these were left to the discretion of the authorities, and that the Church would have no role in them, but would leave decisions such as

whether or not to arrest protestors in the discretion of the civil authorities. Bishop Quinn concurred that such decisions were left up to the civil authorities. (RT at 884-886, 911-12, 1507.)[5]

During the week prior to the ecumenical service, Rhomberg and several other anti-abortion advocates created an *ad hoc* organization called the Anti-Desecration League and helped to draft several threatening letters to the Governor-elect. (RT 1107-1127, 1738.) These three letters showed that the intention of Rhomberg and others was to disrupt the ecumenical service by standing and speaking loudly the words of prayer which were part of the planned service.

One letter, dated January 4, 1991, stated in pertinent part as follows:

> This letter serves to notify you [Governor-elect Wilson], your wife Gayle, and your political staff that you are denied the use of the Cathedral of the Blessed Sacrament (and any other Catholic facility) for the inauguration event you have tried to orchestrate there on Sunday morning, January 6, 1991, at 10:30 a.m.
>
> The request itself is an obscenity, a depraved act by an avowed abortion zealot who

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[5] As this trial testimony makes clear, the suggestion in the Petition (at p. 3) that Church officials disapproved of the arrests in the Cathedral is incorrect. Petitioners' claim (Petition at p. 7) that Bishop Quinn and Monsignor Kidder did not believe Petitioners' activities during the prayer service were disruptive, is likewise incorrect. The clergymen gave no such testimony and the record citations in the Petition do not support this claim. (See also Comm. ER at 10-16.)

> is attempting to gain political advantage by seeking to create the appearance of Church acceptance during your inaugural event.
>
> * * *
>
> We obey the words of Pope John Paul II:
>
> "We will stand up every time that human life is threatened. When the sacredness of life before birth is attacked, we will stand up and proclaim that no one ever has the authority to destroy unborn life."

(Comm. ER at 1-3; see also RT at 1112-13, admitting letter into evidence.)

Another letter, dated January 5, 1991, stated in pertinent part:

> If you [Governor-elect Wilson] choose to persist without change in your defense of totally unrestricted abortion even including little girls ("sex-selection") right up to birth, *we will confront you tomorrow in the Cathedral and continually thereafter*. If you choose to ignore the moral issue we defend, *you can be assured of* continual, and relentless embarrassment and confrontation through the lawful use of public protest: picketing, trumpeting, shouting, taped, loud, multiple recordings of the pitiful wail of babies in mortal danger, and *standing prayer in unison throughout the the [sic] Cathedral tomorrow*.

(Emphasis added; Comm. ER at 4-7; see also RT at 1117-18, admitting letter into evidence.)

The third letter, dated January 6, 1991,[6] stated in pertinent part as follows:

> Our first wave of Faithful Catholics are now attending the 8:00 a.m. Mass at the Cathedral of the Blessed Sacrament. . . . They will claim sanctuary in the ancient tradition of the Roman Catholic Church, and remain in the Cathedral until 11:30 a.m.
>
> Many others who hold tickets will be coming in soon, with other unticketed people to stand up and proclaim to you, " – **we will stand up and proclaim that no one ever has the authority to destroy unborn life."**

(Emphasis in original; Comm. ER at 8; see also RT at 1123, admitting letter into evidence.)

The ecumenical service was scheduled for 10:30 a.m. on Sunday morning, January 6, 1991.[7] There was a regularly scheduled 8:00 a.m. mass at the Cathedral preceding the ecumenical service. Numerous persons (including Rhomberg) attended that mass, sat in seats scattered throughout the Cathedral, remained afterward, and then moved into the first several rows of pews on either side of the main aisle, directly in front of the altar. (RT at 705-07, 914-15.) These pews had been reserved for the family of the Governor-elect. Monsignor Kidder asked

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[6] Rhomberg helped draft this letter on the evening of January 5 in anticipation of the next morning's events. (Comm. ER at 1122-23.)

[7] The regularly scheduled 10:00 a.m. mass was held in the lower hall of the Cathedral, where such masses were customarily held when the Cathedral was being simultaneously used for other purposes. (RT at 914.)

these people (including Rhomberg) to move, but they refused. (RT at 915-16.) Rather than provoke a confrontation, Monsignor Kidder, with Bishop Quinn's concurrence, asked the State Police to allow these people to remain, as they were at that time not doing anything disruptive. (RT 919-920.) Thus the seating for the Governor-elect and his family was changed. (RT at 710.)

During the opening hymn of the ecumenical service (which began with a solo vocalist), many of the people who were sitting in the front rows stood up and began speaking very loudly the words of the Lord's Prayer; this was not part of the ecumenical service and in fact disrupted that service. (RT at 645-46, 657, 721-23, 891, 921.) Rhomberg was part of this group. In accordance with the previous instructions given by the State Police, Colliau approached several of these people, asked them to stop the disruption, told that if they continued he would place them under citizen's arrest and, when they refused, he signaled to the State Police who removed the people from the Cathedral. (RT at 713-15.)

One such person was Rhomberg. From a distance, Colliau heard Rhomberg projecting his voice loudly and approached him. Colliau told Rhomberg he was disrupting the service, asked him to stop and advised him he would be placed under citizens arrest if he continued. Rhomberg ignored him and continued projecting his voice loudly, telling Colliau that he (Colliau) was interrupting him (Rhomberg). (RT at 721-23, 735-41, 1014.) Rhomberg's voice was very loud and disrupted the service. (RT at 739-41, 1649-50, 1682-83.) It was Rhomberg's intention to continue standing and saying the words of

prayer throughout the entire ecumenical service. (RT at 739-41, 1740-41.)

Two State Policemen were in the pew behind Rhomberg and witnessed these events. Colliau signaled towards them and they approached Rhomberg and asked him to come with them. Instead of complying, Rhomberg went limp, collapsed to his knees, and began screaming "holy sanctuary." The two State Policemen dragged him out of the Cathedral; he stopped screaming and got back on his feet only when they got outside of the Cathedral. (RT at 1650-52, 1681-84.)

Tom Cooper

Tom Cooper was a volunteer for the Inaugural Committee and worked on the ecumenical service. He had no contact whatever with Rhomberg, did not place Rhomberg under citizens arrest and was not part of any conspiracy. Summary judgment was granted in Cooper's favor against Rhomberg and the Ninth Circuit affirmed. For record cites and further analysis, see Argument, *infra*, III.B.1.

Martin Wilson

Martin Wilson held the position of director of the Inaugural Committee. He attended the ecumenical prayer service with his family and sat with the rest of the congregation. He had no contact whatever with Rhomberg, did not place Rhomberg under citizens arrest and was not part of any conspiracy. Summary judgment was granted in Martin Wilson's favor against Rhomberg and the Ninth

Circuit affirmed. For record cites and further analysis, see Argument, *infra*, III.B.2.

The Campaign Committee

The Campaign Committee had no involvement in the ecumenical prayer service. Rhomberg nevertheless claimed that the Campaign Committee was liable as the "alter ego" of the nonprofit Inaugural Committee. These two entities were separate and distinct; neither controlled the other and neither was a mere conduit for the other. The trial court granted summary judgment against Rhomberg and in favor of the Campaign Committee and the Ninth Circuit affirmed. For record cites and further analysis, see Argument, *infra*, III.B.3.

Colliau and the Inaugural Committee

After nine days of trial, Rhomberg's claims were submitted to a six-member federal jury. The jury was presented a special verdict form with multiple questions (to which no objections were interposed by Rhomberg or the other plaintiffs). After deliberating for approximately one hour, the jury unanimously rendered its verdict against Rhomberg, as follows:

> Do you find by a preponderance of the evidence that defendant Russell Colliau made a citizens arrest of plaintiff Albin Rhomberg without probable cause in violation of his fourth amendment rights?
>
> Response: no.

> Do you find by a preponderance of the evidence that defendant Colliau violated plaintiff Rhomberg's first amendment right to freedom of speech?
>
> Response: no.
>
> Do you find by a preponderance of the evidence that defendant Colliau violated plaintiff Rhomberg's first amendment right to freedom of religion?
>
> Response: no.

(Comm. ER at 36-41; RT at 2162-67.) Since Rhomberg's claims against the Inaugural Committee were derivative of his claims against Colliau, the verdict was thus in favor of the Inaugural Committee as well as Colliau.

III. ARGUMENT.

The Petition articulates no "compelling reasons" within the meaning of Rule 10 to grant a writ of certiorari as to the judgments entered in favor of any of the Committee Defendants. Although the Petition mentions in passing the summary judgments entered in favor of Respondents Russell Colliau, Martin Wilson and the Campaign Committee, it contains no explanation whatever as to why Rhomberg believes the grant of summary judgment was improper. Nor does the Petition make any specific claim of error as to the jury verdicts in favor of Russell Colliau and the Inaugural Committee. We will, however, address issues which appear to be raised by Rhomberg's Petition and may arguably apply to the Committee Defendants.

A. The Recusal Motion Was Properly Denied.

Judge Burrell's order denying the motion to recuse was a proper exercise of judicial discretion. In the courts below Rhomberg argued recusal was required because defendant Pete Wilson, while a U.S. Senator, recommended that President Bush appoint then-attorney Burrell to the federal bench, and that Burrell had been employed in the Sacramento City Attorney's office approximately two years prior to the events giving rise to this lawsuit.

Rhomberg contends that Judge Burrell's prior employment with the Sacramento City Attorney's office disqualifies him as the judge in this case, even though he was not so employed at the time of any events at issue in this lawsuit. Rhomberg's argument has no merit. Prior government service precludes a District Judge from adjudicating cases only where he or she has served in governmental employment and in that capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the controversy. 28 U.S.C. § 455(b)(3). Rhomberg concedes, however, that the matters at issue in this lawsuit were not pending in the Sacramento City Attorney's office at the time Judge Burrell was employed there. (Comm. ER at 32.) Thus, recusal was plainly not required. See, e.g., *United States v. DeLuna*, 763 F.2d 897, 907-908 (8th Cir. 1985); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-167 (6th Cir. 1979); *United States v. Kelly*, 556 F.2d 257, 262-263 (5th Cir. 1977); *Gravenmier v. United States*, 469 F.2d 66 (9th Cir. 1972).

Further, Rhomberg cited no cases below (and cites none here) to support his assertion that Judge Burrell was required to recuse himself because defendant Wilson, while a United States Senator, recommended him for nomination to the federal bench. Such a claim would appear to be based on 28 U.S.C. § 144, 455(a) or 455(b)(1). Section 144 requires recusal upon a showing "of personal bias or prejudice." Section 455(a) precludes a judge from adjudicating any case in which his or her impartiality might reasonably be questioned, as evaluated on an objective basis. *Liteky v. United States*, 510 U.S. 540, 127 L.Ed.2d 474 (1994). Section 455(b)(1) is essentially duplicative of section 144. *Liteky*, 510 U.S. at 548, 127 L.Ed.2d at 486.

Rhomberg cites no authority supporting the allegation that Judge Burrell had personal bias or prejudice (i.e., "a favorable or unfavorable disposition or opinion that is somehow *wrongful or inappropriate*," *Liteky*, 127 L.Ed.2d at 488), or which would provide an objective basis for reasonably questioning his impartiality. Further, Rhomberg cites no authority to support the theory that a federal judge is disqualified from a case in which a party had previously recommended the judge for nomination to public office. The law is to the contrary. *Vangarelli v. Witco Corporation*, 808 F.Supp. 387 (D.N.J. 1992) [rejecting recusal motion based on fact that defendant governor had previously appointed judge to chair a state commission]; *Hirschkop v. Virginia State Bar*, 406 F.Supp. 721 (N.D.Va. 1975) [rejecting recusal motion based in part upon allegation that defendant governor supported nomination of judge to federal bench].

Indeed, it would be difficult to see how our system of government could properly function if judges were thought to be too beholden to the executive branch officials who appoint them and the legislative branch officials who confirm them (and who appropriate the judicial branch budget) to decide cases in which those officials had an interest. See, e.g., *In the Matter of Bradford Mason, et al.*, 916 F.2d 384, 386-387 (7th Cir. 1990):

> Reasonable, well informed observers of the federal judiciary understand that judges with political friends or supporters regularly cast partisan interests aside and resolve cases on the facts and law. Judges with tenure need not toady, and don't. Chief Justice Burger wrote an opinion that led to the resignation of the President who gave him that office (citation omitted). Justice Holmes wrote a dissent in an antitrust case that President Roosevelt had personally decided to pursue, despite being a frequent guest at the Roosevelts table (citation omitted).

A further reason for denial of the recusal motion is that it was filed more than two years after the case was assigned to Judge Burrell. Plaintiffs' motion was based upon facts that had been matters of public record for years and was thus untimely. *Molina v. Rison*, 886 F.2d 1124, 1131 (9th Cir. 1989); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280 (9th Cir. 1992).

B. The Petition Raises No Questions, Compelling Or Otherwise, Concerning The Grant Of Summary Judgment In Favor Of Defendants Tom Cooper, Martin Wilson And The Campaign Committee.

Although the Petition for Writ of Certiorari identifies Tom Cooper, Russell Colliau and the Campaign Committee

as Respondents, it does not articulate any grounds for challenging the summary judgments entered in their favor. Thus, Rhomberg's petition as to these Respondents should be denied on that basis alone. Moreover, the grant of summary judgment as to all three was correct.

Summary judgment is proper under Federal Rule of Civil Procedure 56(c) when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 323 (1986). Once Cooper, Wilson and the Campaign Committee showed that there was an absence of evidence to support Rhomberg's case, *id.*, at 325, Rhomberg was required to make a sufficient showing on matters on which he had the burden of proof at trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). To establish the existence of a factual dispute, Rhomberg was required to tender evidence of specific facts in the form of affidavits, or admissible discovery, or both, in support of his contention that a factual dispute existed as to his claims against Cooper, Martin Wilson or the Campaign Committee. Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 586-87. Rhomberg also was required to demonstrate that the fact in contention was material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.*, at 251-52.

Rhomberg did not meet his burden and the District Judge was correct in granting summary judgment in favor of Tom Cooper, Martin Wilson and the Campaign Committee.

1. Tom Cooper.

Cooper's motion for summary judgment was based upon testimony that he did not participate in the arrest of any plaintiff – including Rhomberg, and was unaware of and was not a participant in any conspiracy to arrest or remove any person from the Cathedral of the Blessed Sacrament on January 6, 1991. (AER at 666-667.) *No* evidence whatever was offered to support Rhomberg's claims against Cooper or to rebut the evidence submitted by Cooper that he had no involvement in Rhomberg's arrest.[8] In fact, Rhomberg expressly admitted that Cooper was unaware of and was not a participant in any conspiracy to arrest or remove him from the Cathedral. (AER at 740.)

2. Martin Wilson.

Martin Wilson moved for summary judgment based on testimony that he did not participate in the arrest of any person during the ecumenical prayer service and that he was not aware of and did not participate in any conspiracy to arrest or remove any person from the Cathedral during the service. (AER at 662-663.) Martin Wilson was with his family in the congregation during

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[8] The only evidence offered in opposition to the testimony that Cooper did not participate in any arrests was a videotape that could possibly be construed as indicating that a person resembling Cooper was possibly involved in the arrest of plaintiff John Szabo. (AER at 738.) However, Rhomberg did not argue, let alone produce evidence, that Cooper was involved in the arrest of Rhomberg himself.

the service. (Comm. ER at 17-21.) Martin Wilson did not even learn until months later that Colliau was even involved in any citizen's arrests that day. (AER 81-83, 85.)

Rhomberg offered no evidence to rebut or dispute the evidence submitted in support of Martin Wilson's motion. Further, Rhomberg (and all other plaintiffs) expressly admitted below that Martin Wilson did not participate in any arrests during the ecumenical service and was neither aware of nor a participant in any conspiracy to arrest or remove people from the Cathedral. (AER at 738-739.)

3. The Campaign Committee.

The Campaign Committee moved for summary judgment based upon testimony that the Campaign Committee had no involvement with, and did not participate in any way in, the ecumenical prayer service or other events relating to the inauguration of Governor Wilson in January 1991. (AER at 664-665.) Rhomberg offered no evidence showing that the Campaign Committee engaged in any wrongful conduct. (AER at 1275.) Rhomberg argued below that the Campaign Committee was liable for acts of the Inaugural Committee on the theory that it was the "alter ego" of the Inaugural Committee. (AER at 1275.)

To establish alter ego liability, Rhomberg would have had to produce evidence establishing the following elements: (1) one Committee controlled the other; (2) one Committee was a mere conduit for the other; and (3) allowing the Campaign Committee to maintain a legally separate existence would constitute a fraud or injustice

upon the plaintiffs. See generally 15 Cal.Jur.3d, Corporations, § 37; *Marr v. Postal Union Life Ins. Co.*, 40 Cal.App.2d 673, 681 (1940). Rhomberg, however, offered no such evidence.

The unrebutted testimony below showed: that the Campaign Committee was an unincorporated association and a registered political committee pursuant to Cal. Gov. Code §§ 81000 et seq.; that the Campaign Committee was distinct and separate from the 1991 Inaugural Committee, which was a nonprofit corporation; that the Campaign Committee had no control or influence over the activities of the 1991 Inaugural Committee and that the 1991 Inaugural Committee had no control or influence over the activities of the Campaign Committee. (AER at 664-665.)

C. The Petition Raises No Compelling Reason For Review Of The Jury Verdicts In Favor Of Colliau And The Inaugural Committee.

Rhomberg's Petition for Writ of Certiorari scarcely mentions the unanimous jury verdicts in favor of Russell Colliau and the Inaugural Committee. Although the Petition devotes much time arguing the wisdom of this Court's abortion jurisprudence,[9] it fails to identify any trial error which even arguably could serve as a basis to overturn these jury verdicts.

The Petition vaguely suggests that the jury was somehow "misled" by the trial court concerning the rights of the unborn or the right of Rhomberg to protect

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[9] Such claims do not appear to be directed at the Committee Defendants and we will not respond to them.

his religious beliefs. Rhomberg, however, made no such objections to the jury instructions. Nor did Rhomberg object to the special verdict form which covered these same subjects. The jury was given ample opportunity to consider Rhomberg's claims, and it unanimously rejected them.

To the extent Rhomberg's appeal could conceivably be construed as claiming the jury was erroneously instructed, his failure to make specific objections prior to the submission of instructions to the jury bars him from doing so now. Rule 51 of the Federal Rules of Civil Procedure expressly provides in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*

Id., emphasis added; see also, *City of Springfield v. Kibbe*, 480 U.S. 257, 258-260, 107 S.Ct. 1114, 94 L.Ed.2d 293, rehearing denied, 481 U.S. 1033 (1987).

The only other argument that Rhomberg could possibly have made on appeal is that there was insufficient evidence to support the jury verdicts against him. Such a claim, however, is not made in the Petition for Certiorari and, even if it were, it would be patently frivolous. Rhomberg made no motion under Federal Rule of Civil Procedure 50 at trial,[10] and this precludes him from contesting the sufficiency of the evidence to support the

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[10] Two of his fellow plaintiffs at trial made such a motion, but not Rhomberg. (RT at 1916-17.)

verdicts in favor of Colliau and the Inaugural Committee. *United States v. 33.5 Acres, Okanogan County*, 789 F.2d 1396, 1400 (9th Cir. 1986); 5A J. Moore, *Moore's Federal Practice*, ¶50.05[1] at pages 50-56; 9A C. Wright and A. Miller, *Federal Practice and Procedure* (1995), § 2536 at pages 329-330; see e.g., *Johnson v. New York, New Haven & Hartford RR. Co.*, 344 U.S. 48, 49 (1952), *citing Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947) and *Globe Liquor Co, Inc. v. San Roman, et al.*, 332 U.S. 571, 98 S.Ct. 246, 92 L.Ed. 177 (1947); *Neely v. Martin K. Eby Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967).

IV. CONCLUSION.

It is respectfully submitted that the Petition for Writ of Certiorari filed by Albin Rhomberg against Russell Colliau, Tom Cooper, Martin Wilson, the Pete Wilson Campaign Committee and the 1991 Inaugural Committee should be denied.

DATED: June 20, 1997

Respectfully submitted,

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